IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.37 OF 2002
AND
CRIMINAL APPEAL NO.38 OF 2002

CRIMINAL APPEAL NO. 37 OF 2002

Shri Godwin Pereira,
r/o H. No.263,
Engrojwado, Marna,
Siolim, Bardez, Goa. ... Appellant.

versus

S T A T E
through the Public Prosecutor. ... Respondent.

CRIMINAL APPEAL NO. 38 OF 2002

Shri Mathew Pereira,
r/o H.No. 263,
Engrojwado, Marna,
Siolim, Bardez, Goa. ... Appellant.

versus

S T A T E
through the Public Prosecutor. ... Respondent.

.....

Mr. Nitin Sardessai, Advocate for the Appellants in both the Appeals.

Mr. S. N. Sardessai, Public Prosecutor for the State in both the Appeals.

CORAM: P. V. HARDAS, J.

DATED: 25TH JULY, 2003.

O R A L J U D G M E N T

The Appellants/Original Accused Nos.1 and 2 stand convicted for an offence punishable under Section 323 r/w Section 34 and under Section 326 r/w Section 34 of the Indian Penal Code and are sentenced to pay fine of Rs.500/- each in default Simple Imprisonment for 10 days and Rigorous Imprisonment for 5 years and to pay fine of Rs.1000/- each in default Simple Imprisonment for 1 month respectively, by the Additional Sessions Judge, Mapusa, by Judgment dated 17th August, 2002, in Sessions Case No.17 of 2000. It is this conviction and sentence which is challenged by the Appellants/Original Accused Nos.1 and 2 in the present Appeal.

2. The facts in brief as are necessary for the decision of these Appeals are stated hereunder:-

P.W.2, Namdev Toraskar, states that on 27th December, 1998, at about 7 p.m., he had gone to watch a game organised by the feast committee. While returning, he saw Original Accused No.1, Godwin Pereira, coming from the opposite direction. He greeted Accused No.1, Godwin Pereira, but there was some problem between Accused No.1,

Godwin Pereira and the driver of a trax vehicle with Maharashtra registration. He further states that in the meanwhile, the brother of Accused No.1, Godwin Pereira, i.e. Original Accused No.3, Vincy Pereira, came to the scene and gave a slap on his left cheek and ran away. He further states that at that time, P.W.1, Shailesh Madgaonkar, was a few steps behind him while P.W.3, Rajendra Madgaonkar, was alongside. He further states that Accused No.1, Godwin Pereira and Accused No.2, Mathew Pereira, came from behind and Accused No.1 Godwin Pereira, dealt a blow of a chopper on his left cheek. As a result of his blow, he suffered a bleeding injury on his cheek and he ran away from the scene of the offence. In the cross-examination, it is admitted that there was no confusion and no talks between Accused No.1, Godwin Pereira and himself. An omission was brought out that he had not stated in his statement that there was some problem between the driver of the trax and Accused No.1, Godwin Pereira. Similarly, an omission was brought out that he had not stated that he was chased by Accused No.1, Godwin Pereira and Accused No.2, Mathew Pereira.

3. P.W.1, Shailesh Madgaonkar, states that on 27th December, 1998, he along with P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar were returning from the feast at Siolim. They were proceeding towards their house situated at Gudem, Siolim. He states that Accused

No.1, Godwin Pereira, came from Siolim side on his motor-cycle and there was some talk between P.W.2, Namdev Toraskar and Accused No.1, Godwin Pereira. Accused No.1, Godwin Pereira, returned to his house and came with Accused No.2, Mathew Pereira. Accused No.1, Godwin Pereira, assaulted Nanu, P.W.2, with the chopper on his head. Seeing the assault on Nanu, P.W.3, Rajendra Madgaonkar, went to his rescue. Accused No.1, Godwin Pereira, also assaulted Rajendra on his shoulder area. One Rama Parab intervened and stopped Accused No.1, Godwin Pereira, from assaulting P.W.1, Shailesh Madgaonkar. He has further stated that he was near the sweetmeat shop when a heated discussion took place between Nanu, P.W.2 and Accused No.1, Godwin Pereira. He further states that he had lodged a complaint at Exh.15. In the complaint at Exh.15, it is stated that Accused No.1, Godwin Pereira, had gone home and returned with Accused No.2, Mathew Pereira and Accused No.3, Vincy Pereira. In the report, it is stated that Accused No.2, Mathrew Pereira, was armed with a knife but had not inflicted any injuries. P.W.1, Shailesh Madgaonkar, in his evidence has given a complete go-bye to the fact that Accused No.3, Vincy Pereira, had also returned with Accused No.1, Godwin Pereira and Accused No.2, Mathew Pereira was armed with a knife. An important omission was brought out in his statement regarding his having not stated to the Police that Accused No.1, Godwin Pereira,

went towards his house on account of the tiff he had with the trax driver.

4. P.W.3, Rajendra Madgaonkar, states that there was some dispute between P.W.2, Namdev Toraskar, and Accused No.1, Godwin Pereira and two persons had come on a motor-cycle. Accused No.1, Godwin Pereira, assaulted P.W.2, Namdev Toraskar, with a chopper on his face. He further states that Accused No.1, Godwin Pereira, assaulted him with a chopper on his head and forearm.

5. Both P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar, were examined by P.W.6, Dr. B. S. Babu, who was attached to the P.H.C., Siolim. The Hurt Certificate in respect of P.W.2, Namdev Toraskar, is at Exh.25. P.W.2, Namdev Toraskar, had sustained one incised wound 10 cm x 1 cm x 1 cm on the left cheek. The Hurt Certificate in respect of P.W.3, Rajendra Madgaonkar is at Exh.26. P.W.3, Rajendra Madgaonkar, had received (1) incised wound vertical extending to base of skull 9 cm x 1 cm. (2) incised wound on left shoulder 8 cm x 1 cm x 1 cm. (3) contused lacerated wound on left elbow 2 cm x 1 cm. (4) incised wound on left forearm 4 cm x 1 cm x 1 cm. (5) abrasion on right thumb and (6) abrasion on back.

6. P.W.6, Dr. B. S. Babu, has described the injury nos.1, 2 and 4 as grievous injuries. In respect of P.W.2, Namdev Toraskar, P.W.6, Dr. B. S. Babu, has described the injury as grievous injury. Section 320 of the Indian Penal Code states which kind of injuries are designated as grievous. In the present case, both P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar were discharged from the hospital after about two days. P.W.6, Dr. B. S. Babu, has neither in his evidence nor in the Hurt Certificates at Exhs.25 and 26 referred to the injury referred by P.W.3, Rajendra Madgaonkar, as injuries which would endanger life. On examination of the injury certificates and the evidence of P.W.6, Dr. B. S. Babu, it is clear that none of the injuries can be classified as grievous hurt in terms of Section 320 of the Indian Penal Code. The Courts are not bound to accept the ipsi dixit of the doctor when he classifies the injuries as grievous.

7. In the present case, the prosecution had not examined the Investigating Officer as he was reported to have expired during the trial. The prosecution had examined P.W.4, Dr. Marvin Correia who was attached to Asilo Hospital as Surgeon. His evidence is of no assistence as he had examined the sutured wound suffered by both P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar. The prosecution has examined P.W.5, Anant

Dhargalkar to prove the scene of offence panchanama at Exh.22.

8. On examination of the evidence of P.W.1, Shailesh Madgaonkar, P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar, it is clear that Accused No.1 Godwin Pereira, had inflicted injuries to P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar by means of a chopper. The chopper has admittedly not been seized during investigation. However, despite minor contradictions and omissions, the prosecution has been able to prove the infliction of the injuries by Accused No.1, Godwin Pereira. Accused No.2, Mathew Pereira, is convicted with the aid of Section 34. There is no evidence to suggest that Accused No.2, Mathew Pereira who had accompanied Accused No.1, Godwin Pereira shared the common intention of causing injury to P.W.2, Namdev Toraskar. According to P. W. 2, Namdev Toraskar, there was no quarrel between Accused No.1, Godwin Pereira and him, though other witnesses P.W.1, Shailesh Madgaonkar and P.W.3, Rajendra Madgaonkar speak about some heated discussion between Accused No.1, Godwin Pereira and P.W.2, Nanu. According to P.W.2, Namdev Toraskar, Accused No.1, Godwin Pereira, had a tiff with the driver of the trax vehicle. In such circumstances, it cannot be said that Accused No.2, Mathew Pereira, shared the common intention of Accused No.1, Godwin Pereira to assault

P.W.2. Namdev Toraskar. The genesis of the assault on P.W.2, Namdev Toraskar, is shrouded in mystery. Be that as it may, Accused No.2, Mathew Pereira, is not alleged to have either assaulted P.W.2, Namdev alias Nanu or P. W. 3, Rajendra or participated in assault on them. In such circumstances, the conviction of Accused No.2, Mathew Pereira with the aid of Section 34 is not justified at all. Accused No.2, Mathew Pereira, is, therefore, entitled to be acquitted.

9. I have already held that the prosecution has been able to establish that Accused No.1, Godwin Pereira, had inflicted injuries on P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar. The evidence of P.W.6, Dr. B. S. Babu, and the Hurt Certificates at Exhs.25 and 26 do not establish that they had received grievous injuries. Therefore, according to me, an offence punishable under Section 326 of the Indian Penal Code is not made out. However, Accused No.1, Godwin Pereira, would be guilty of an offence punishable under Section 324 of the Indian Penal Code of having caused hurt by a weapon used for cutting.

10. Mr. Nitin Sardessai, learned Counsel appearing on behalf of the Appellants has urged before me that Accused No.1, Godwin Pereira, was aged about 21 years on the date of the commission of the offence. A

sentence of imprisonment is likely to jeopardise the prospects of Accused No.1, Godwin Pereira, in seeking employmeent abroad. In such circumstances, the learned Counsel appearing on behalf of the Appellants submits that the Appellant Godwin Pereira be sentenced to the imprisonment which he has already undergone. He further submits that compensation under Section 357 of the Code of Criminal Procedure be awarded to P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar, in lieu of a substantive sentence of imprisonment to Accused No.1, Godwin Pereira.

11. Taking into consideration the age of the Appellant and also apparently the fact that the genesis of the offence has been suppressed by the prosecution, according to me, the ends of justice would be met by imposing the sentence of imprisonment of Accused No.1, Godwin Pereira, which he has already undergone. Accordingly, the conviction of Accused No.1, Godwin Pereira, for an offence punishable under Section 323 of the Indian Penal Code and the sentence of fine of Rs.500/- in default Simple Imprisonment for 10 days is maintained. The conviction of Accused No.1, Godwin Pereira, for an offence punishable under Section 326 of the Indian Penal Code is hereby quashed and set aside and instead he is convicted for an offence punishable under Section 324 of the Indian Penal Code and is sentenced to

suffer imprisonment already undergone. He is also sentenced to pay fine of Rs.1000/-. Accused No.1, Godwin Pereira, shall pay compensation under Section 357 of the Code of Criminal Procedure of Rs.10,000/- each to P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar. The amount, if recovered, be paid to P.W.2, Namdev Toraskar and P.W.3, Rajendra Madgaonkar. Criminal Appeal No.37 of 2002 is thus partly allowed.

12. The conviction and sentence of Accused No.2, Mathew Pereira, is hereby quashed and set aside and he is acquitted for the offence for which he was charged and convicted. Accordingly, Criminal Appeal No.38 of 2002 is allowed.

P. V. HARDAS, J.

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